UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CONSOLIDATED COMMUNICATIONS HOLDINGS, INC. d/b/a CONSOLIDATED COMMUNICATIONS OF TEXAS COMPANY	§	**CASES**	**16-CA-187792**
	§		**16-CA-192050**
Respondent,	§		
and	§		
COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,	§		
Charging Party.	§		

CHARGING PARTY COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO'S ECEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

DAVID VAN OS & ASSOCIATES, P.C.
8626 Tesoro Dr., Ste. 510
San Antonio, TX 78217
Telephone: (210) 824-2653
Facsimile: (210) 824-3333

Matt Holder
Texas State Bar No. 24026937
Email: matt@vanoslaw.com

COUNSEL FOR CHARGING PARTY

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COMES NOW Charging Party Communications Workers of America, AFL-CIO ("CWA" or "Charging Party" or "the Union") and files pursuant to Rule § 102.46 of the Rules and Regulations of the National Labor Relations Board ("the Board" or "NLRB"), 29 C.F.R. § 102.46, these exceptions to the September 28, 2017 decision of the Administrative Law Judge ("ALJ") dismissing the unfair labor practice charges against Respondent Consolidated Communications Holdings, Inc. d/b/a Consolidated Communications of Texas Company ("Consolidated" or "Respondent" or "the Company"), which alleged that Consolidated violated Section 8(a)(1), 29 U.S.C. § 158(a)(1), and 8(a)(3), 29 U.S.C. § 158(a)(3), of the National Labor Relations Act ("the Act" or "NLRA") as alleged in the Amended Consolidated Complaint and Notice of Hearing (General Counsel Exhibit ("GC") 1) by disciplining CWA Local 6218 Area Representative Kim Thompson ("Thompson") and creating an unlawful impression of surveillance of Thompson, and would respectfully show the following in support of these exceptions:

I. Summary of Exceptions

a. The ALJ erred in finding the October 13, 2016 demonstration barred by the labor agreement's no-strike provision

The ALJ's decision erroneously found that the October 13, 2016 demonstration that led to the discipline of Thompson, CWA's Area Representative in Conroe, Texas, was a work stoppage barred by the no-strike provision of the parties' labor agreement. (ALJ Decision ("Decision"), pp. 4-5). This conclusion is in error because such demonstrations are protected concerted activity under Section 7 of the Act, 29 U.S.C. § 157, and there was no evidence that the demonstration interfered with work at the Conroe call center. As such, the discipline imposed on Thompson for the demonstration violated Section 8(a)(1) of the Act, 29 U.S.C § 158(a)(1), and Section 8(a)(3), 29 U.S.C. § 158(a)(3).

b. The demonstration was not so egregious as to lose the protection of the Act

Additionally or in the alternative, the ALJ also failed to find the demonstration to be otherwise protected by Section 7 because it did not lose that protection under the standard adopted by the Board in *Atlantic Scaffolding Co.*, 356 NLRB 835, 837 (2011) and *Quietflex Mfg. Co.*, 344 NLRB 1955, 1056-1057 (2005).

c. The ALJ erred in concluding that Thompson was not subject to an unlawful impression of surveillance

The ALJ held that Thompson was not subject to an impression of unlawful surveillance because her conduct was not protected. (Decision, p. 6). Since, as argued above and as the subject of an earlier exception, Thompson's conduct was protected under Section 7 of the Act, subjecting her to the impression of surveillance violated Section 8(a)(1) of the Act.

d. *The ALJ erred in his application of* Wright Line *to Thompson's discipline*

ALJ's conclusion that Consolidated did not violate Section 8(a)(3) of the Act incorrectly applied the framework established under *Wright Line*, 251 NLRB 1083 (1980), *enf'd* 662 F.2d 899 (1st Cir.1981), cert. denied 455 U.S. 989 (1982); *see also NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 395 (1983) (noting with approval the Board's approach adopted in *Wright Line*). The ALJ's conclusions should be rejected and Consolidated be held to have unlawfully disciplined Thompson.

e. *The ALJ erred in concluding that Consolidated did not violate Sections 8(a)(1) and 8(a)(3) by disciplining only Thompson*

ALJ's conclusion that Consolidated did not violate Section 8(a)(3) of the Act, 29 U.S.C. § 158(a)(3), by only disciplining only Thompson, the Union representative (Decision, p. 5), contravenes the holding of the United States Supreme Court in *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 702 (1983), which prohibits the imposition of more severe discipline on union officers than other employees for participating in a work stoppage.

II. Statement of the Facts

CWA and Consolidated are parties to a collective bargaining relationship. In October of 2016, they were negotiating a successor agreement that was ultimately ratified in May 2017. (Transcript ("Tr.") 28; Joint Exhibit ("JX") 1). These negotiations were contentious and in 2016-2017 went for longer than they normally took. (Tr. 29). Kim Thompson, the discriminate in this case, is employed by Consolidated as a Customer Service Representative for residential customers at 350 South Loop 336 West in Conroe, Texas and serves the local union as an Area Representative for Conroe, a position akin to a chief steward. (Tr. 25-27).

Thompson testified that the negotiations in September and October of 2016 were not going very well because "We were losing a lot of our benefits that we had before." (Tr. 29-30). In

support of CWA's bargaining objectives, the Union called for a demonstration by supporters on October 13, 2016 at approximately 2:00 p.m. Darrell Novark, the president of CWA Local 6218, informed Thompson that the Union planned to make a show of support by having employees stand at 2:00 p.m. in support of the Union's bargaining efforts. (Tr. 30-31).

Thompson communicated the Union's plan to her coworkers orally and by text message. (Tr. 31). Thompson requested the employees participate in the demonstration and stated to Consolidated during its investigation of the incident that she "did not tell folks to stand" and "The employees elected to stand up on their own free will." (Tr. 57; GC 3). Kristi Lindsey testified that the request was not coercive. (Tr. 67). Mary Schnee, a coworker of Thompson's who was subpoenaed by the Company to testify, stated she was "asked" on October 13th. (Tr. 103). Specifically, Schnee testified that

> A. About mid-morning somebody came around, an individual, and asked, you know, she came to my desk and said, "Will you do me a favor?"
>
> "Sure."
>
> And said, "Well, about 2:00 that the negotiations would be going on for," you know, between the Union and the Company, and as a show of support, they were asking everybody to stand up at two o'clock.
>
> I said, "Sure." (Id.).

Thompson testified that five to six employees participated in the demonstration on October 13th by standing in their cubicles and stretching; the employees "Just stood up, as if you would stand up and stretch from sitting all day." (Tr. 33). Thompson took photographs of the demonstration along with her coworker Kristi Lindsey, who testified that Novark had requested them to illustrate support for the Union. (Tr. 36, 66; GC 2). Schnee subsequently informed the Company of the incident because she "did not want to have one of those pictures come across the desk of my

employer, and for them to think that I was associated or affiliated or supporting in any way the Union or their activities." (Tr. 104).

Dionna Kelley, Thompson's supervisor, received an instant message on October 13th from Schnee about the incident. Schnee did not initially disclose Thompson's role to Kelley, but Kelley the asked if it was Thompson and Schnee applied in the affirmative. (GC 5, p. 2). Kelley contacted Kari Juni, Consolidated's Director of Customer Care, that day and informed her "that Kim Thompson, had agents stand at 2:00 in 'union solidarity' and she took a pic." (GC 4, p. 2). Juni responded "That is not cool." (Id.). Kelley then asked "just want to make sure, she is not supposed (sic.) discuss, meet or talk about the union unless she is requested to be in a disciplinary agent meeting. Am I understanding correctly?" (Id.). Juni responded "Yes. This, in my mind, is doing union activity during work hours." (Id.). Juni conferred with Rhetta Bobo, the Company's labor relations representative, and stated "we need to address Kim immediately because she shouldn't be conducting union business on company time except for grievance." (Id.).

Kelley called Thompson into her office on October 13th towards the end of the day. (Tr. 83). Thompson testified about meeting as follows:

> She said that it was brought to her attention by two sources that this behavior had occurred, this picture taking and the standing up or solidarity for CWA, and that it was inappropriate, it was against rules, I shouldn't have done it, I knew better, and she had a smirk on her face like she was really agitated. (Tr. 40).

Thompson asked who informed Kelley of her conduct. (Tr. 83). Thompson was told by Kelley that it "was not really my business like it was confidential who told on me, but the behavior was inappropriate and I should know better." (Tr. 40).

Later that day, Juni messaged Kelley and said, "I want to do a verbal for Kim. I am not playing with her any longer." (GC 4, p. 3). Thompson received a verbal warning on October 18th for requesting "agents to stand for a photo to demonstrate union solidarity." (JX 2).

III. Arguments and Authorities

The discipline imposed by Consolidated on Thompson violated Sections 8(a)(1) and 8(a)(3) of the Act. Thompson's conduct was protected, concerted activity in support of CWA's efforts to bargain a successor labor agreement. The ALJ erred in finding the demonstration to be an unprotected work stoppage. The ALJ also erred by not finding the demonstration to be otherwise protected by Section of the Act. Further, the ALJ erred in finding that Consolidated did not create an impression of surveillance because, contrary to the holding of the ALJ, Thompson was engaged in protected, concerted activity and therefore the impression of surveillance violated Section 8(a)(1) of the Act. Finally, Consolidated violated Section 8(a)(3) by punishing only Thompson for the demonstration because even if the demonstration was an unprotected work stoppage, Consolidated could not punish Thompson more harshly for her actions because she was an Area Representative for the Union.

a. The ALJ erred in finding the October 13, 2016 demonstration barred by the labor agreement's no-strike provision

The parties' labor agreement contains a no-strike clause. (JX 1, p. 8). The ALJ recommended that the allegations of the complaint be dismissed because the October 13th demonstration constituted a work stoppage in derogation of the labor agreement. (Decision, pp. 5-6). This conclusion is in error because the conduct engaged in by the Union on that date did not constitute an unprotected work stoppage. The record is bereft of any evidence that the Union intended to deploy economic weapons by having its supporters withhold their labor or that any work was not performed as a result of the demonstration. To the contrary, the Union's only intent was to engage in a showing of solidarity in support of its collective bargaining positions.

1. The demonstration was not a work stoppage

In *DaimlerChrysler Corp.*, 344 NLRB 1324 (2005), a case relied by the ALJ in his decision, the Board found an employee's emails to constitute advocacy for a work slowdown because the employee was lobbying his coworkers to engage in conduct that "would confound the Respondent's efforts to provide pool cars consistent with the parties agreement and would result in lost work time." *DaimlerChrysler*, 344 NLRB at 1325. The Board further found the language used by the discriminatee in *DaimlerChrysler* evidenced his intent to urge his coworkers to engage in a slowdown. *DaimlerChrysler* at 1326. In this case, there is no evidence that Thompson sought or advocated a work slowdown. The evidence established that Thompson only asked in a non-coercive manner that her coworkers to show support for the Union by standing at their workstations at 2 pm on October 13th. (Tr. 30-31, 57, 67, 103). These facts stand in diametric opposition to those of *DaimlerChrysler*.

Further, it should be noted that at no time did Respondent describe the October 13th demonstration as a slowdown or work stoppage. The verbal warning that Thompson received does not accuse her or the Union of a work stoppage of any kind; rather it states she is being disciplined for asking "agents to stand for a photo to demonstrate union solidarity." (JX 2). There was no evidence at the hearing that calls were missed or otherwise disrupted by the demonstration. In fact, Lindsey testified that she resumed taking calls approximately thirty to forty-five seconds into the demonstration because they came through her call queue. (Tr. 66-67).

Thompson's job duties were distinct from those of the other Customer Service Representatives employed at the Conroe call center because she worked on the Texas telephone book directories for Consolidated and she did proof reading of those directories as well as

determine what context goes into the telephone book, directory assistance and Caller ID complaints. (Tr. 26). Thompson described her role in the demonstration as follows

Q Did anyone participate in the display of support?

A Yes.

Q Did you?

A I did.

Q And about what time was it?

A 2:00 that day, on October the 13th.

Q And where were you?

A In my cube where I sit on a daily basis in the Call Center Department.

Q And how many people approximately participated?

A Five or six.

Q What did you do?

A Stood up and just stretched. Just stood up, as if you would stand up and stretch from sitting all day.

Q Did you continue working?

A Yes. (Tr. 32-33).

It should be noted that Thompson was assigned to directory services for Consolidated and her job did not regularly require her to take calls from customers. (Tr. 33, 69). Thompson testified as follows in response to a question from the ALJ as to how she could work during the demonstration:

JUDGE RINGLER: So how were you able to continue to work? Is there a headset or do you call on a speakerphone? If you could explain -- I am not trying to put words in your mouth.

THE WITNESS: Okay, my duty -- I am not on the phone. I can speak to people on the phone, and I do have a wireless headset. I work on the directory, so if I stand up, I mean, I am

not -- I could still talk at my computer and stand up and talk at my computer, or if I was on the phone, I could be on the phone with my wireless headset, and the majority of people that did, had a headset on and the display will show that they were still in their cube with their headsets on.

So I stood up and stretched for about a minute, and I did take pictures, but -- then we sat down and the people that stood up, stood up, and the people that didn't, didn't, and then we -- at 2:00 that's what we did, and then we sat down. We didn't leave our stations. We didn't walk around. We didn't get in a group. We just stood up from where we were sitting at, and stood up. Kind of like this *[demonstrating]*, just stood up where we were, and that's it.

MS. MONAHAN DUGGAN: Let the record reflect that the witness just stood up at her chair, and sat back down.

THE WITNESS: Some people put their hands up, like this *[demonstrating]*. Some people put their hands up. Some -- most people just stood up. (Tr. 33-34).

The demonstration lasted approximately one to two minutes or less because as Lindsey testified she had to resume working once she had work come through to her on the call queue. (Tr. 66-67). Thompson then testified that her coworkers wore headsets that had a cord or were wireless, but that those with a cord were long enough to allow representatives to walk to the printer they used. (Tr. 34-35). Thompson conceded that she did not work while taking the photographs (tr. 47), but that time was *de minimis* and incidental to the protected act of taking pictures of a show of Union solidarity.

Lindsey's conduct during the demonstration is crucial to understanding why it is not a work stoppage. Lindsey described her participation in the demonstration as follows:

Q And did you continue to wear your headset when you stood up?

A Yes, ma'am.

Q Did you -- about how long do you think you stood up for?

A 30 or 45 seconds. I had calls coming in real fast so—

Q And when your new call came in, what did you do?

A Business as usual, taking my call and helping my customers like I was supposed to. (Tr. 66-67).

Lindsey ceased demonstrating and photographing the demonstration and returned to work immediately when she had calls through her queue. Thompson's work on the directory was not driven by incoming calls and there is no evidence in the record that she or any other call center employee who participated in the demonstration missed any work. This evidentiary deficiency is crucial because under *Wright Line*, 251 NLRB 1083 (1980), *enf'd* 662 F.2d 899 (1st Cir.1981), cert. denied 455 U.S. 989 (1982); *see also NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 395 (1983) (noting with approval the Board's approach adopted in *Wright Line*), the Respondent has the burden to prove by a preponderance of the evidence that a work stoppage actually occurred. *Wright Line*, 251 NLRB at 1089. That burden was not met in this case because Lindsey resumed working when she had a call in her queue and Thompson's job duties allowed her the flexibility to participate and photograph the demonstration without missing work. The record in this case does not support the ALJ's conclusion that the demonstration was a work stoppage and the ALJ's recommendation should be denied.

2. The ALJ read the labor agreement's no-strike provision too broadly

The ALJ read the no-strike provision of the labor agreement too broadly in applying it to the demonstration that Thompson and her coworkers engaged in on October 13th. Unions may waive Section 7 rights in a collective bargaining agreement. *Verizon New England, Inc. v. NLRB*, 826 F.3d 480, 483 (D.C. Cir. 2016) (citing *American Freight System Inc. v. NLRB*, 722 F.2d 828, 832 (D.C. Cir. 1983) ("It is well settled that a union may lawfully waive statutory rights of represented employees in a collective bargaining agreement.")). Such a waiver, however, must be clear and unambiguous. *Metropolitan Edison*, 460 U.S. at 708.

The labor agreement prohibits strikes and slowdowns, such conduct, as argued above, did not occur here because work continued during the demonstration and no work was missed as a

result of the demonstration. Under these facts, the conduct of Thompson and her coworkers cannot be construed as a strike or a slowdown for purposes of the provision of the labor agreement. The language of the labor agreement cannot be read to constitute a waiver of Section 7 rights to demonstrate because such conduct is not explicitly mentioned. The ALJ's overbroad reading of the labor contract that animates his recommendation should be rejected.

b. *The demonstration was not so egregious as to lose the protection of the Act*

Additionally or in the alternative, the ALJ erred in determining the demonstration to be unprotected solely because he deemed it a work stoppage in violation of the labor agreement's no-strike provision. (Decision, pp. 5-6). In doing so, the ALJ failed to assess the demonstration under the factors used by the Board in *Atlantic Scaffolding Co.*, 356 NLRB 835, 837 (2011) and *Quietflex Mfg. Co.*, 344 NLRB 1955, 1056-1057 (2005). Under this analysis, the existence of a contractual waiver is not explicitly the decisive factor but arguably one of many that would be assessed in determining whether the demonstration was so egregious as to lose the protection of Section. As set forth below, the demonstration was protected by Section 7 and under *Atlantic Scaffolding* and *Quietflex* was protected under the Act.

1. The protected nature of the demonstration

"In order for employee conduct to fall within the ambit of Section 7, it must be both concerted and engaged in for 'mutual aid or protection.' These are related but separate elements that the General Counsel must establish in order to show a violation of Section 8(a)(1)." *Holling Press, Inc.*, 343 NLRB 301, 302 (2004). Section 7 of the Act protects concerted activities for the purpose of collective bargaining as well as broader purposes that fall under mutual aid and protection. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). In this case, Thompson participated

with her coworkers in a demonstration in support of CWA's collective bargaining objectives, which constitutes concerted activity for mutual aid and protection.

The Company does not dispute that Thompson's organization and participation in the demonstration was the basis, in part, for her discipline. The October 18th warning Thompson was issued states that requesting agents to stand on October 13th "to demonstrate union solidarity" was the reason for the discipline. (JX 2). The statement on the warning is also consistent with the instant message exchange between Kelley and Juni concerning Thompson having "agents stand at 2:00 in 'union solidarity,'" which culminated in Juni authorizing the verbal warning for Thompson. (GC 4, pp. 2-3). In cases where it is undisputed that as an employee's protected, concerted activity was the basis for discipline, evidence of motive is not required for purposes of establishing a violation of Section 8(a)(1). *Phoenix Transit Systems*, 337 NLRB 510, 510 (2002).

The other element giving rise to the October 18th discipline concerns Thompson's photographing of the October 13th demonstration. Employees have a right under Section 7 to photograph and otherwise memorialize their concerted acts of mutual aid and protection. *Hawaii Tribune-Herald*, 356 NLRB 661, 661 (2011) (employee audio recording of potential violation of Section 7 rights); *White Oak Manor*, 353 NLRB 795, 795, n. 2 (2009) (photographing employees so as to establish a dress code was disparately applied to employees).

2. The demonstration did not lose the protection of the Act

In cases where an employee is disciplined for recording, photographing or otherwise documenting concerted activity, the "pertinent question is whether the conduct is sufficiently egregious to remove it from the protection of the Act." *Hacienda Hotel, Inc.*, 348 NLRB 854, fn. 1 (2006), quoting *Stanford Hotel*, 344 NLRB 558, 558 (2005); see generally *Atlantic Steel Co.*, 245 NLRB 814 (1979). The ALJ's conclusion that the demonstration lost the protection of the Act

because it violated the no-strike clause should be rejected because that conclusion is contrary to the balancing test used by the Board to determine if a work stoppage loses protection of the Act. In making this assessment, the Board examines

> (1) the reason the employees have stopped working; (2) whether the work stoppage was peaceful; (3) whether the work stoppage interfered with production, or deprived the employer access to its property; (4) whether employees had adequate opportunity to present grievances to management; (5) whether employees were given any warning that they must leave the premises or face discharge; (6) the duration of the work stoppage; (7) whether employees were represented or had an established grievance procedure; (8) whether employees remained on the premises beyond their shift; (9) whether the employees attempted to seize the employer's property; and (10) the reason for which the employees were ultimately discharged. *Atl. Scaffolding Co.*, 356 NLRB at 837 (citing *Quietflex Mfg. Co.*, 344 NLRB at 1056-1057).

No single factor from this balancing test is dispositive. *Quietflex* at 1056. In this case, the balance of factors favors finding the October 13th demonstration to be protected. It was in support of the Union's bargaining demands, it was peaceful, there is no evidence that the demonstration interfered with work at the call center, the demonstration was brief and lasted only one to two minutes, the employees' had an inadequate opportunity to present their concerns to management over bargaining because the Company was seeking to cut benefits, the employees were given no warning, no employees remained past their shift, and no property was seized.

Thompson's activity on October 13th was not sufficiently egregious to deprive her of Section 7's protection for documenting the show of solidarity. Thompson did not coerce employees to participate in the demonstration. There was no shouting, chanting, patrolling or other disruptive conduct. The photographing by Thompson memorialized nothing more than what anyone would see if they had walked on the floor of the call center that day.

It should also be noted that employees were not misled as to the nature of the demonstration or its purpose. The photographs would have conveyed no more or less a message of support than

a supervisor would have understood if she had directly observed the demonstration. Therefore Schnee and other similarly situated employees were told of the reason for the demonstration and likewise the reason for the photographs. While Schnee did contact management, she filed no unfair labor practice charge concerning the incident or otherwise complain about the incident to the Union. In fact, as far as CWA knew, Schnee consented to participate in the concerted activity because she voluntarily stood up on October 13th. These facts do not support denying Thompson the protection of Section 7 for her participation and photographing of the demonstration on October 13th and the Company should be found to have violated Section 8(a)(1) by disciplining her on October 18th. See *Randell Warehouse of Arizona, Inc.*, 347 NLRB 591, 591 (2006) (photographing of employees objectionable if no reason is provided to the employees being photographed). The balancing of the *Atlantic Scaffolding* and *Quietflex* factors support finding that Thompson's conduct during the demonstration was protected under Section 7 and the contrary recommendation by the ALJ should be rejected.

c. The ALJ erred in concluding that Thompson was not subject to an unlawful impression of surveillance

The ALJ recommended that the allegation concerning an unlawful impression of surveillance be dismissed because there was no impression of surveillance as to protected activities. (Decision, p. 6). The conclusion that Thompson was no engaged in protected activities should be rejected for the reasons argued above. An employer creates an unlawful impression of surveillance when it informs an employee that her pro-union activity is known to the employer and the employer refuses to disclose how it learned of the activity. *Avondale Industries*, 329 NLRB 1064, 1265 (1999). In *Avondale*, a supervisor called an employee to the side and told him he knew the employee supported the union and refused to tell the employee how he learned of his support for the union. This was found to constitute unlawful surveillance because

> A supervisor's calling an employee away from other employees and then telling him that his prounion sympathies were known, but refusing to tell the employee, when asked, how that knowledge was gained, is an action designed to convey to that employee that the information was gained by stealth, and unlawful means, not observation of open and obvious activity (such as [the employee's] bumper sticker). The act of telling the employee that the communication was "off the record" would further tend to coerce the employee by threatening him. *Avondale*, 329 NLRB at 1265.

The facts of *Avondale* are present in this case. Thompson asked Kelley on October 13th how she learned of Thomson's role in the demonstration. (Tr. 40). Kelley responded that Thompson "wouldn't find out that information." (Tr. 83). Just as in *Avondale*, Kelley told Thompson she learned of her activity by secretive means, not by open observation, such as looking out of her office, which reasonably implied that Kelley had resorted to "stealth, and unlawful means," as was reasoned in *Avondale*. The coercive manner in which Kelley told Thompson she knew about Thompson's concerted activities was conveyed in a manner to coerce and intimidate Thompson, and thereby violated Section 8(a)(1) of the Act. The ALJ's contrary conclusion should therefore be rejected.

d. *The ALJ erred in his application of* Wright Line *to Thompson's discipline*

The ALJ found the *prima facie* case under *Wright Line* had been met but aired in finding Consolidated met its burden that it would have disciplined Thompson anyway based on the ALJ's conclusion that Thompson's conduct was unprotected due to the labor agreement's no strike provision. (Decision, pp. 5-6). That conclusion is in error and Thompson's discipline can additionally or in the alternative found to violate Section 8(a)(3) under *Wright Line*'s dual motive analysis.

Under *Wright Line***,** the General Counsel carries the burden of persuading by a preponderance of the evidence that the protected conduct was a motivating factor, in whole or in part, for the employer's adverse employment action. Proof of unlawful motivation can be

established by direct evidence or inferred from circumstantial evidence based on the whole of the record. *Robert Orr/Sysco Food Services***,** 343 NLRB 1183, 1184 (2004); *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003). In this case, there is direct and inescapable evidence that Thompson's Union activity led to her discipline because it was her act of having employees stand for a display of solidarity and her photographing of that show of solidarity that resulted in her discipline.

The Board has held that animus can be inferred from facts such as, in relevant part, departures from past practice and past tolerance of the conduct at issue as well as disparate treatment. *Medic One, Inc.*, 331 NLRB 464, 475 (2000). In this case, further evidence of discriminatory intent exists in this case because it involves conduct that Consolidated previously tolerated, but disciplined Thompson for in this case because it was concerted activity for mutual aid and protection. Employees are permitted to stand and stretch. (Tr. 84). Additionally, only Thompson, a Union official was disciplined.

These facts establish the *prima facie* case under *Wright Line*, which the ALJ correctly concluded had been met. The ALJ's subsequent conclusion that the discipline would have been imposed any should be rejected and his recommendation dismissing the *Wright Line* allegation should be rejected.

e. *The ALJ erred in concluding that Consolidated did not violate Sections 8(a)(1) and 8(a)(3) by disciplining only Thompson*

ALJ's conclusion that Consolidated did not violate Section 8(a)(3) of the Act, 29 U.S.C. § 158(a)(3), by only disciplining only Thompson, the Union representative (Decision, p. 5), contravenes the holding of the United States Supreme Court in *Metropolitan*, 460 U.S. at 702 that prohibits the imposition of more severe discipline on union officers than other employees for participating in a work stoppage. As the Court noted, "The Board has found that disciplining union

officials more severely than other employees for participating in an unlawful work stoppage 'is contrary to the plain meaning of Section 8(a)(3) and would frustrate the policies of the Act if allowed to stand.'" *Metropolitan Edison* at 702 (citing *Precision Castings Co*., 233 NLRB 183, 184 (1977). In this case, Lindsey was not disciplined, (Tr. 69), despite the fact that she engaged in conduct identical to that of Thompson. Consolidated's decision to single out Thompson because of her position in the Union renders its discipline of her an unlawful act of disparate treatment.

In this regard, it should also be noted in assessing Consolidated's unlawful motive to discipline Thompson that Kelley was aware of prior demonstrations by the Union, including picketing, at the Conroe office. (Tr. 90-91). Juni was likewise aware of the Union's other concerted actions. (Tr. 100). Kelley asked Schnee if Thompson was involved in the demonstration. (GC 5, p. 2). Juni told Kelley that the demonstration was "not cool" and that Juni wanted to discipline Thompson because Juni was "not playing with her any longer." (GC 4, pp. 2-3). The written discipline also evidenced Consolidated's animus towards Thompson as a Union official by noting that she should have known as a Union official her conduct contravened Company policy. (JX 2). This evidence establishes anti-union animus for the purpose of *Wright Line* and establishes that Thompson was targeted because of her position in the Union. Her discipline was the result of disparate treatment under in violation of Section 8(a)(3) and the contrary conclusions of the ALJ should be rejected.

IV. Conclusion and Prayer

Kim Thompson engaged in and photographed a peaceful demonstration in support of the Union's bargaining positions during contentious negotiations in October 2016. Consolidated learned of her actions and disciplined her for them in violation of Section 8(a)(1) and 8(a)(3) of the Act. The ALJ erroneously concluded that Consolidated's conduct was permissible. Charging

Party Communications Workers of America, AFL-CIO urges the National Labor Relations Board to reject the conclusions of the ALJ and hold Respondent Consolidated Communications Holdings, Inc. to have violated the National Labor Relations Act as argued above by disciplining Kim Thompson.

Respectfully Submitted,

DAVID VAN OS & ASSOCIATES, P.C.
8626 Tesoro Dr., Ste. 510
San Antonio, TX 78217
Telephone: (210) 824-2653
Facsimile: (210) 824-3333

/s/ Matt Holder
Matt Holder
Texas State Bar No. 24026937
Email: matt@vanoslaw.com

COUNSEL FOR CHARGING PARTY

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing document was served on Counsel for the General Counsel and Counsel for Respondent by electronic mail on this 26th day of October 2017:

LAURIE MONAHAN DUGGAN, ESQ.
National Labor Relations Board
1919 Smith, Suite 1545
Houston, Texas 77002
Telephone: (346) 227-1369
Facsimile: (281) 228-5619
E-mail: laurie.duggan@nlrb.gov

Counsel for the General Counsel

DAVID LONERGAN, ESQ.
AMBER ROGERS, ESQ.
Hunton and Williams LLP
1445 Ross Avenue, Suite 3700
Dallas, Texas 75202
Telephone: (214) 979-3061; (214) 979-3308
Facsimile: (214) 979-3932
E-mail: dlonergan@hunton.com
arogers@hunton.com

Counsel for Respondent

/s/ Matt Holder
Matt Holder